

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN C. HENRY, et. al.,

Plaintiff(s),

Case No.: 04-40346-FL

vs.

HON. PAUL V. GADOLA
MAG. JUDGE WALLACE CAPEL, JR.

QUICKEN LOANS, INC., et. al.,

Defendant(s).

REPORT AND RECOMMENDATION

I. INTRODUCTION

Before the Court is Defendant's "Motion to Dismiss Jeffrey Bade and Jennifer Deuby as Consenting Plaintiffs Due to Failure to Permit Discovery and For Assessment of Costs and Attorney's Fees Pursuant to F.R.C.P. 37," filed May 25, 2005, and "Motion to Dismiss Matthew Moskus as a Consenting Plaintiff Due to Failure to Permit Discovery and For Assessment of Costs and Attorney's Fees Pursuant to F.R.C.P. 37," filed August 31, 2005.

II. COURT RULE

Federal Rule of Civil Procedure 37(d) states:

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision

(b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

III. ANALYSIS

These Motions were brought before the Court after the parties failed to reach an agreement on conditions to be applied to the Plaintiff's voluntary withdrawal from the case after Plaintiffs failed to comply with the discovery process. On February 13, 2006, a hearing was held on this matter, and for the reasons stated on the record the undersigned determined that prior consenting Plaintiffs Jeffery Bode, Jennifer Deuby, and Matthew Moskus should be dismissed from the lawsuit, pursuant to their wishes, but with prejudice.

It was also decided at that hearing that Plaintiffs Deuby and Moskus were not to be called as witnesses during the trial in this matter unless they submitted him/herself for deposition on this matter. It was additionally decided that Plaintiff may not introduce or use for any purpose, any statement or affidavit by Bade, Deuby or Moskus unless he/she has submitted his/herself for deposition in this matter. And finally, it was determined that Defendants are awarded five thousand, six hundred and twenty-six (\$5,626.00) dollars in costs and attorney fees against Jeffery Bade.

IV. CONCLUSION

For the reasons stated above, it is respectfully recommended that the Court enter an order **ADOPTING** the recommendations made in this Report and Recommendation.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation that they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

In accordance with the provisions of Rule 6(b) of the Federal Rules of Civil Procedure, the Court, in its discretion, may enlarge the period of time in which to file objections to the report.

s/Wallace Capel, Jr.
WALLACE CAPEL, JR.
UNITED STATES MAGISTRATE JUDGE

Date: March 7, 2006

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Kathleen L. Bogas, Charlotte Croson 33 Bloomfield Hills Parkway, Suite 145, Bloomfield Hills, Michigan 48304, Kimberly J. Bull, Lawrence G. Campbell, Sheryl A. Laughren, James B. Perry, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226-3425, Robert P. Davis, 1909 K Street, NW, Washington, DC 20006-1101, and Paul J. Lukas, Donald H. Nichols, and Rachhana T. Srey, 4600 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402.

and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant(s): Michele R. Fisher, 4644 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402.

s/James P. Peltier

United States District Court

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